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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 607

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER,

*Petitioner,*

—*v.*—

PHILLIP J. McNELLIS, as Trustee of Donald S. Potter, Bankrupt, et al,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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THE DAILY RECORD CORP. — ROCHESTER, N. Y.

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of Facts | 3 |
| Reasons for Granting Writ | 6 |
| (A) Summary | 6 |
| (B) Argument | 7 |
| Conclusion | 16 |
| Appendix | 1a |
| Memorandum Decision and Order Granting Defendant Summary Judgment and Dismissing Plaintiffs Complaint (Jan. 14, 1966) | 1a |
| Decision of Justice Ringrose in the State Court Action | 6a |
| Order Dismissing Appellants Appeal to the Appellate Division | 16a |
| Order of Justice Ringrose Granting Appellee's Motion For Summary Judgment in the State Court Action | 17a |
| Opinion of Feinberg, J. for the United States Court of Appeals | 25a |

# CITATIONS


| Cases | Page |
|---|---|
| *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932) | 15 |
| *Angel* v. *Bullington*, 330 U. S. 183 (1947) | 15 |
| *Bannon* v. *Bannon*, 270 N. Y. 484 (1936) | 15 |
| *Coucounas* v. *Coucounas*, 33 Misc. 2d 559 (Sp. T. Kings 1962) | 14 |
| *Davis* v. *Davis*, 305 U. S. 32 (1938) | 14 |
| *DeCross* v. *Turner & Blanchard, Inc.*, 267 N. Y. 207 (1935) | 15 |
| *Flynn* v. *Sinclair Oil Corp.*, 20 A. D. 2d 636 (1st Dept. 1964), aff'd (14 N. Y. 2d 853, 1964) | 12 |
| *Goldstock* v. *Kramer*, 6 Misc. 2d 8 (Sp. T. Bronx 1957) | 14 |
| *Gramm* v. *Lincoln*, 257 F. 2d 250 (9th Cir. 1958) | 15 |
| *Heisner* v. *Woodruff*, 327 U. S. 726 (1949) | 15, 16 |
| *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183 (1941) | 14 |
| *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D. Del. 1954) | 15 |
| *Keller* v. *Greyhound Corp.*, 41 Misc. 2d 255 (Sp. T. Queens 1963) | 13 |
| *Lehrenkrauss* v. *Bonnell*, 199 N. Y. 240 (1910) | 8 |
| *Linton* v. *Perry Knitting Co.*, 295 N. Y. 14 (1945) | 11, 12 |

Page

*Mills* v. *Durgee*, 7 Cranch (11 U. S.) 481 (1813) .... 14

*Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1939) ..... 15

*Reich* v. *Cochran*, 151 N. Y. 122 (1896) ..... 15

*Riley* v. *Southern Transp. Co.*, 278 App. Div. 605 (3rd Dept. 1951) ..... 15

*Schuylkill Fuel Corp.* v. *B & C. Nieberg Realty Corp.*, 250 N. Y. 304 (1929) ..... 15

*Smith* v. *Kirkpatrick*, 305 N. Y. 66 (1953) ..... 15

*Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3rd Cir. 1950), cert. denied, 341 U. S. 921 (1951) ..... 15

**Treatises**

C. P. L. R., Rule 5013 ..... 10

Ehrenzweig, *Conflict of Laws* (1962) sec. 47 at 166-167 ..... 15

Federal Bankruptcy Act, Section 67 (d) ..... 10

New York Banking Law, Section 380 (e) ..... 9

New York Debtor and Creditor Law, Article 10 ..... 10

3 Weinstein, Korn & Miller, *New York Civil Practice*, Para. 3025.18 at 30-454, 30-455 ..... 13

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*Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Robinson, Williams, Brown, Robinson and Angeloff, on behalf of Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on July 27, 1966.

## OPINIONS BELOW

Copies of the Opinion of Justice Ringrose for a Special Term of the New York State Supreme Court and order entered pursuant thereto, the Order dismissing respondents' appeal from Justice Ringrose's decision to the Appellate Division of the New York State Supreme Court for the Fourth Judicial Department, the Memorandum Decision and Order of Judge Brennan for the Federal District Court, and the Opinion of Feinberg, J. for the United States Court of

Appeals for the Second Circuit and that Court's Judgment of reversal are appended to this petition in the Appendix at pp. 1a to 36a.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on the 27th day of July, 1966, and a copy thereof is appended to this petition in the Appendix at pp. 25a to 36a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

The petition places in question the determination of the United States Court of Appeals for the Second Circuit that the denial of a motion for leave to serve a supplemental complaint in a New York State Supreme Court action was not on the merits and as such was not entitled to res judicata effect in a later action brought in the Federal District Court on the same cause of action, the Federal District Court having held that the denial of leave to serve the supplemental complaint in the State Court was on the merits and entitled to res judicata effect. The Questions presented are:

(1) Whether the denial of respondents' motion to serve a supplemental complaint by Justice Ringrose in the State Court action was "on the merits"?

(2) If the denial of that motion was on the merits, whether the Memorandum decision and Order of Judge Brennan dismissing a complaint on the same cause of action in the Federal District Court should have been affirmed by the United States Court of Appeals for the Second Circuit?

(3) Whether the reversal of Judge Brennan's Order by the United States Court of Appeals for the Second Circuit constituted a denial of Full Faith & Credit by a Federal Court to a State Court Judgment?

(4) Whether the decision of the United States Court of Appeals for the Second Circuit that the denial of the motion for leave to serve the supplemental complaint by Justice Ringrose in the State Court action was not "on the merits" constituted a decision by a Circuit Court of Appeals on an important question of local law in conflict with applicable local decisions?

## STATEMENT OF FACTS

On April 27, 1962, First Federal Savings and Loan Association of Rochester, the Appellee below and Petitioner herein, granted a mortgage to the Randolph House Motor Hotel Corp. At the time of closing, a mortgage origination fee in the amount of $124,000.00 was paid to Petitioner. In February, May and June of 1963, the Randolph House Motor Hotel Corp., Donald S. Potter, the sole shareholder of the Randolph House Motor Hotel Corp., and the Potter Securities Corp., a corporation which owned all of the capital stock of the Randolph House Motor Hotel Corp., respectively, were adjudicated bankrupts. On or about November 21, 1963, the trustees for the bankrupts (hereinafter called Respondents) commenced an action in the New York Supreme Court to set aside the payment of the mortgage origination fee and to recover double damages on the ground that the fee was usurious and a fraudulent conveyance. Shortly thereafter, Respondents sought leave to serve a supplemental complaint which alleged that three subsequent mortgage payments were also usurious and fraudulent conveyances. Petitioner and Respondents moved for summary judgment (Respondents' motion being withdrawn before decision). The New York State Supreme Court per Justice Ringrose disposed of these and other motions by decision dated June 19, 1964. Justice Ringrose, rejecting Respondents' claims of usury and fraudulent conveyance, granted Petitioner's motion for summary judgment. In addition,

Justice Ringrose denied Respondents' motion to serve the supplemental complaint on the ground that the decision announced with respect to the original complaint precluded any recovery on the ground of usury and fraudulent conveyance on the issues raised by the supplemental complaint.

Respondents filed a Notice of Appeal from this decision to the Appellate Division for the Fourth Department. In November of 1965, Petitioner moved to dismiss this Appeal on the ground that Respondents had failed to seasonably file and serve the papers on Appeal and on December 2, 1965, the Appellate Division granted Petitioner's motion and entered an Order dismissing the Appeal. Significantly, this Order of the Appellate Division finally closed the doors of the Courts of New York to Respondents both on the issues decided by the summary judgment granted to Petitioner and also on the propriety of the trial court's dismissal of Respondents' motion to serve the supplemental complaint.

On May 12, 1964 while the State Court action was pending Respondents began an action in the Federal District Court for the Northern District of New York making allegations so similar to the State Court complaint and supplemental complaint as to make these complaints indistinguishable. This action was stayed pending the outcome of the State Court action. After Justice Ringrose's decision, the entry of the Order rendered pursuant to that decision, and the dismissal of Respondents' Appeal to the Appellate Division, the Federal Court action was continued. Petitioner moved for summary judgment principally on the ground that the Federal complaint presented issues already finally adjudicated in the State Court action and that the defense of res judicata therefore applied. Petitioner contended that the matter contained in the supplemenary complaint could not constitute an independent basis for decision in the Federal action since the issues raised in the supplementary complaint were

naturally a part of the single transaction or occurrence which was the basis of the original State Court complaint and that the issues raised in the supplementary complaint were therefore not only necessarily litigated in the State Court action, but also were in fact litigated in the State Court action in light of Justice Ringrose's denial of plaintiff's motion to serve the supplemental complaint "In view of the decision above announced". Judge Brennan heard arguments on the motion on June 8, 1964 and, in a decision rendered January 14, 1966, granted Petitioner's motion for summary judgment. In rejecting Respondents' contention that the supplemental complaint raised issues not litigated in the State Court, Judge Brennan stated that:

> "If, as the State Court has held, the usury statutes do not apply, it is difficult to understand how the payments alleged to have been made upon the valid mortgage instrument held by the defendant would be invalidated. The alleged fact that the payments were made by Donald Potter might have some relevancy to plaintiff's principal contention that the corporations were mere dummies through which he acted but would seem to have no probative effect upon the validity of the instrument itself. The above is not the full measure of plaintiff's difficulty in regard to this contention."

Continuing, Judge Brennan correctly noted that *"The right to recover, asserted by the plaintiffs in the State Court action, rests upon the same factual and legal bases."* .Emphasizing that the Federal Court could on a motion for summary judgment consider whether the principle of res judicata applied to matters outside of the pleadings, Judge Brennan concluded that the defense of res judicata applied and commented that:

> "No question is raised but that the State Court had jurisdiction in the matter of the cause of action above referred to, as instituted and decided therein. Reported legal precedents appear to be unanimous in holding that *an adjudication of a controverted matter by a competent State Court forecloses further litigation as to issues actually raised and as to relevant issues which could have been litigated therein.*"

Respondents took an appeal from Judge Brennan's decision to the United States Court of Appeals for the Second Circuit on the ground that Justice Ringrose's denial of their request to serve the supplemental complaint did not constitute an adjudication on the merits and as such was not entitled to res judicata effect before the Federal District Court. The Second Circuit reversed that part of Judge Brennan's decision which gave res judicata effect to Justice Ringrose's disposition of the fraudulent conveyance allegations raised in the supplemental complaint. Two basic reasons were advanced by the Second Circuit in support of their decision: (1) that the allegations in the supplemental complaint constituted a separate and distinct cause of action from those contained in the original complaint, and (2) that Justice Ringrose's disposition of plaintiff's motion to serve the supplemental complaint was not an adjudication on the merits and was therefore not res judicata to the subsequent litigation of that point in the Federal District Court.

## REASONS FOR GRANTING WRIT

### (A) SUMMARY

It is petitioner's contention (1) that the Second Circuit misapplied prevailing principles of New York law in holding that Justice Ringrose's denial of the motion to serve the supplemental complaint on a motion for summary judgment was not on the merits, (2) that the language contained in the State Court decision leaves no doubt that the denial of the motion to serve the supplemental complaint was on the merits, (3) that the decision of the Federal District Court according the State Court's denial of the motion to serve the supplemental complaint res judicata effect should have been affirmed by the Second Circuit, and (4) that the failure of the Second Circuit to so hold (a) will subject Petitioner to further illegal and vexatious litigation, (b) constitutes a de-

cision by the Second Circuit on an important state question in conflict with the clear decision of the State Court and applicable state law, (c) is a clear departure from the accepted and usual course of judicial proceedings insofar as the trustee in bankruptcy is afforded an unfair opportunity to re-litigate in Federal Court a question finally settled in a State Court, and (d) violates the mandatory requirements of the Constitution and Statutes of the United States that a final judgment of a State Court on the merits be accorded Full Faith and Credit in any subsequent suit on that judgment in a Federal Court.

## (B) ARGUMENT

When New York's Justice Ringrose prefaced the dispository paragraph of his decision with the statement "In view of the decision above announced", he could only have intended his dismissal of Respondents' motion to serve the supplemental complaint to be final and on the merits. The original complaint raised the question of the propriety of the mortgage origination fee on two counts: (1) fraudulent conveyance, and (2) usury. Respondents' State Court Complaint admitted that Donald S. Potter was the sole shareholder of Randolph House Motor Hotel Corp. Both parties moved for summary judgment (Respondents' motion later being withdrawn) and Respondents also moved the Court for permission to serve a supplemental complaint containing a so-called "third cause of action" to set aside three subsequent payments on the mortgage as fraudulent conveyances. Thus the State Court had before it both the motions for summary judgment and the motion for permission to serve the supplemental complaint prior to reaching its decision. The Court granted Petitioner's motion for summary judgment, which was addressed to both complaints and held that the mortgage was not usurious and that the mortgage origination fee did not constitute a fraudulent

conveyance. In reaching this decision the Court dwelled at length upon the relationship of Donald S. Potter to the Randolph House Motor Hotel Corp.

In making this adjudication the Court, of course, had before it the supplemental complaint. That complaint was based upon the theory that three mortgage payments were made by Donald S. Potter in his individual capacity and as such were fraudulent conveyances with respect to his individual creditors. In writing that Potter must be deemed to stand in the shoes of the corporation with regard to the usury allegation, it is inconceivable that the State Court was not apprised of the fact that this finding would be conclusive to the merits of the fraudulent conveyance theory raised both in the original and supplemental complaint. If the mortgage was not usurious and secured a valid indebtedness and in addition, if the business activities of Donald S. Potter and the Randolph House Motor Hotel Corp, were indistinguishable, there could be no question that a payment of a part of the indebtedness secured by the mortgage, whether the mortgage origination fee or the subsequent payments, was for a "fair consideration" and as such not subject to attack as fraudulent conveyances. See *Lehrenkrauss* v. *Bonnell,* 199 N. Y. 240 (1910). Whether viewed from the point of view of Donald S. Potter or the Randolph House Motor Hotel Corp., the mortgage origination fee and the three subsequent payments produced the same beneficial result, i.e., Petitioner, First Federal Savings and Loan Association, was induced by these payments to grant the mortgage and forebear from foreclosing on the premises in order to pay the principal indebtedness. This forebearance on the part of Petitioner was obviously of equal benefit to both Donald S. Potter and the Randolph House Motor Hotel Corp. Potter's sole ownership and domination of the corporation made it perfectly natural that he pay the corpora-

tion's debt, if in fact he did so. This line of reasoning is made even more persuasive in our case by the admission contained in paragraph 14 of the original State Court complaint that "no capital was paid in to Randolph House Motor Hotel Corp. by Donald S. Potter for the issuance of its stock". The State Court's denial of the motion to serve the supplemental complaint "In view of the decision above announced" must under the foregoing facts and circumstances have been intended as a final adjudication on the merits of the issues raised in the supplemental complaint.

The complaint submitted by Respondents to the Federal District Court was substantially a copy of the complaint which had been considered by the State Court. With the exception of paragraph 10 which differs in each complaint with respect to an immaterial allegation and paragraphs 13 and 19 which set forth the same allegations in slightly different language, the first 27 paragraphs of each complaint are identical. These paragraphs set forth the venue of the action and the bankruptcy-adjudication of the Respondents. In addition, allegations with respect to the individual Respondents utilizing the corporate Respondents as dummies to facilitate business operations are set forth. The remainder of the Federal complaint (paragraphs 28-42) and the State Court complaint (paragraphs 28-39) describe the mortgage financing obtained by Respondents from Petitioner, the payment of the $124,000.00 mortgage origination fee, and the payment of $55,144.00 in three mortgage payments to Petitioner. Allegations with respect to the usurious nature of these payments and the insolvency of the Respondents are also set forth in these paragraphs. In each complaint (paragraphs 41 and 42 of the Federal Complaint and paragraphs 32-34 and 37 of the State Complaint) the Respondents set forth an identical legal basis for their claims, namely, the violation of Section 380(e) of the New York Banking Law (the usury statute), and the violation of

Article 10 of the New York Debtor and Creditor Law and Section 67(d) of the Federal Bankruptcy Act (the fraudulent conveyance statutes). Finally, the prayer for relief in each complaint is identical, i.e., double damages for the alleged payment of a usurious mortgage origination fee and the return of the three mortgage payments on the ground that their payment allegedly violated the fraudulent conveyance statute. Confronted with a Federal Complaint which was virtually identical to the State Court Complaint with respect to both the factual allegations and the legal basis of recovery, the Federal District Court correctly concluded that the principle of res judicata prevented Respondents from re-litigating their claim in Federal Court. Significantly, the Federal District Court recognized that the State Court's disposition of the motion for leave to serve the supplemental complaint had been on the merits and was accordingly within the doctrine of res judicata. The Second Circuit sought to circumvent the thrust of this reasoning by stating that the allegations of the supplemental complaint constituted a separate cause of action and that Justice Rigrose's disposition of the motion to serve the supplemental complaint was not on the merits. This, however, is an erroneous interpretation of Rule 5013 of the C. P. L. R. Rule 5013 provides that:

> "A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise."

The determinative issues decided in the State Court were the freedom of the mortgage indebtedness from the taint of usury and the fact that the granting of the valid mortgage to Respondents by Petitioner constituted fair consideration not only for the mortgage origination fee but also for all subsequent payments on the mortgage which therefore precluded

any allegations of fraudulent conveyance with respect to those payments. There can thus be no question that the motion for summary judgment and the motion for leave to serve a supplemental complaint were adjudicated after the close of the proponent's evidence and were therefore on the merits. *Linton* v. *Perry Knitting Co.*, 295 N. Y. 14 (1945) considered a similar situation. In the first action, defendant moved to dismiss the complaint on the ground that the cause of action alleged therein was barred by the Statute of Limitations and that the Workmen's Compensation Law of New York provided the exclusive remedy of the plaintiff and liability of the defendant. Defendant's motion was granted and the complaint was dismissed. A second action was thereafter commenced between the same parties and ostensibly on the same cause of action. Defendant's motion to dismiss the complaint was denied by a Special Term of the Supreme Court. The Appellate Division reversed and granted the motion. On appeal, the New York Court of Appeals affirmed stating that:

> " . . . even if the judgment in the earlier action was not a judgment on the merits — a point that we do not decide . . . The former judgment was a final determination that for either of two legal reasons the allegations of the earlier complaint were without more quite ineffectual. Such a determination, whether right or wrong, is a bar to another action for the same cause unless the defects or omissions adjudged to be present in the one action are corrected . . . The complaint now before us is virtually a copy of its predecessor. Hence dismissal of the present action was validly directed . . . " (17)

In the case at bar, the identity of the State and Federal complaints as described above leaves no question that the supplemental complaint was "virtually a copy of its predecessor." Justice Ringrose's denial of plaintiff's motion for leave to serve the supplemental complaint "In view of the decision above announced", is a clear indication that the supplemental complaint suffered from the same defects

found in the original complaint. This was an even stronger case than *Linton* insofar as the denial of leave to serve the supplemental complaint was also on the merits. The evidence of both parties was before the Court in the form of numerous affidavits and legal memoranda. It is of great significance that both parties moved for summary judgment. The later withdrawal of Respondents' motion could only have been intended to muddy the waters with regard to the question of whether the Court had reached "the merits" in the event the Petitioner's motion for summary judgment was granted. The Court of Appeals again considered this problem in *Flynn* v. *Sinclair Oil Corp.*, 20 A. D. 2d 636 (1st Dept. 1964). The first action was based upon the alleged negligence of an oil burner installer in repairing a stairway and railing previously damaged by it. That action was dismissed on the ground that it failed to state a cause of action. No appeal was taken from this dismissal. Another complaint was served which in essence raised the same claim for damages and added certain allegations concerning the continued fuel service by defendant. In addition plaintiff moved to add another defendant. Defendants cross-moved to dismiss the complaint. Special Term denied defendants' motion and permitted plaintiff to add the new defendant. The Appellate Division reversed and granted defendants' motion to dsimss the complaint on the ground that:

> "... plaintiff's complaint is virtually identical to one previously dismissed for failure to state a cause of action. No appeal was taken from that dismissal at Special Term. Accordingly, this second cause is barred on the ground of res judicata, and the complaint should have been dismissed ..." (636-37)

On appeal, the Court of Appeals affirmed without opinion (14 N. Y. 2d 853, (1964)). Significantly, in our situation, as in both the *Linton* and *Flynn* cases, no appeal was seasonably taken from Justice Ringrose's decision. In fact, the Appellate Division for the Fourth Judicial Department

granted petitioner's motion to dismiss respondent's appeal for failure to prosecute. Though Justice Ringrose's disposition of the motion to serve the supplemental complaint was on the merits, respondent's failure to prosecute their appeal precluded them from further litigating the point in the State Courts. Finally, it should be noted that Justice Ringrose's decision was consistent with the prevailing rules of New York Civil Practice regarding the propriety of permitting service of a supplemental pleading. A leading commentator has stated the rule as follows:

> ". . . leave to serve a supplemental pleading should be denied if there clearly is no need for an additional pleading as would be the *case when new facts can be established under the original pleading* . . . The delay and added effort that result from the granting of leave to serve a supplemental pleading and the service of a response to the supplemental pleading are not justified *if the material is unnecessary.*" (emphasis added)
>
> 3 Weinstein, Korn & Miller, *New York Civil Practice,* Para. 3025.18 at 30-454, 30-455.

In our situation, the merits of the supplemental complaint were reached in the Court's disposition of the original complaint and Justice Ringrose's denial of the motion to serve the supplemental complaint was simply the manifestation of his opinion that the supplemental complaint raised no new issues of fact or law. Since it is impossible to determine any other reason whatever for the State Court dismissal, especially in view of the language used in the decision, the decision in the State Court must have been a decision on the merits. The following New York cases support this procedural interpretation.

> (1) *Keller* v. *Greyhound Corp.*, 41 Misc. 2d 255 (Sp. T. Queens 1963): "It is recognized that ordinarily upon a motion such as this (i.e. to serve the supplemental pleading) the court will not concern itself with the sufficiency of the proposed pleading . . . and further that subdivision (b) of rule 3025 of the Civil Practice Law

and Rules provides that leave to serve supplemental pleadings 'shall be freely given'. However, where the insufficiency of the proposed pleading is clear, and free from doubt as a matter of law, it would serve no useful purpose to grant leave to serve a supplemental pleading. Leave to serve a supplemental pleading, under such circumstances, does not benefit the plaintiff and results only in wasting the time of the trial court and causing unnecessary expense in the administration of justice." (256)

(2) *Goldstock* v. *Kramer,* 6 Misc. 2d 8 (Sp. T. Bronx 1957): On motion for leave to serve supplemental pleading setting up a defense, the Court stated: "I recognize that, usually, the legal merits of a proposed defense would not be passed upon on an application for leave to interpose it . . . That would normally await a subsequent direct attack. But, where — as I think is the case here — the new pleading is so patently unnecessary and so plainly insufficient, I see no reason to allow it and thus to require a motion to strike which can but be granted thus leaving the pleadings as they were . . ." (9)

(3) *Coucounas* v. *Coucounas,* 33 Misc. 2d 559 (Sp. T. Kings 1962): "While under normal circumstances, on a motion to amend, a court will not examine into and determine the merits of a proposed amended pleading, it must deny such application if the pleading is palpably deficient." (560)

The refusal of the Circuit Court of Appeals for the Second Circuit to give recognition to the foregoing authority and to conclude that Justice Ringrose's denial of the motion to serve the supplemental complaint was on the merits constitutes a failure on the part of that court to give a State Judgment the Full Faith and Credit mandated by the Constitution of the United States and implementing statutes. See:

(1) *Mills* v. *Duryee,* 7 Cranch (11 U.S.) 481 (1813)

(2) *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U.S. 183 (1941)

(3) *Davis* v. *Davis,* 305 U.S. 32 (1938)

(4) *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932)

(5) Ehrenzweig, *Conflict of Laws* (1962) sec. 47 at 166-167

In addition under either State or Federal Law there is no question that a proper finding by the Second Circuit in regard to Justice Ringrose reaching the merits on his denial of the motion to serve the supplemental complaint would have necessitated their affirmance of Judge Brennan's District Court decision on the ground of res judicata.

See:

(1) *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 38 (1950)

(2) *Angel* v. *Bullington*, 330 U.S. 183 (1947)

(3) *Bannon* v. *Bannon*, 270 N.Y. 484 (1936)

(4) *DeCosse* v. *Turner & Blanchard, Inc.*, 267 N.Y. 207 (1935)

(5) *Gramm* v. *Lincoln*, 257 F. 2d 250 (9th Cir. 1958)

(6) *Heisner* v. *Woodruff*, 327 U.S. 726 (1946)

(7) *Kaufman* v. *Shoenberg*, 154 F. Supp 64 (D. Del. 1954)

(8) *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1939)

(9) *Reich* v. *Cochran*, 151 N.Y. 122 (1896)

(10) *Riley* v. *Southern Transp. Co.*, 278 App. Div. 605 (3rd Dept. 1951)

(11) *Schuylkill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N.Y. 304 (1929)

(12) *Smith* v. *Kirkpatrick*, 305 N.Y. 66 (1953)

(13) *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3rd Cir. 1950), cert. denied, 341 U.S. 921 (1951)

Finally, it is of crucial importance to recognize that the misapplication of State law, the obvious misconstruction of

a prior State decision, and the refusal to accept a prior final determination of a State Court by the Circuit Court of Appeals in this case is of great and recurring significance in the administration of the Federal Bankruptcy Laws. The important nature of these issues has already been recognized by this court in *Heisner* v. *Woodruff*, 327 U.S. 726 (1946). The policy promulgated in *Heisner* by Chief Justice Stone that the unsuccessful litigation of an issue outside of the Federal Courts by a trustee in bankruptcy precludes him from later re-litigating that point in a Federal Court stands to be circumvented by the Circuit Court's unreasonable interpretation of the prior State decision and State Law. The trustee in bankruptcy is not entitled to preferential treatment in order to permit him a chance to re-litigate the same issues in Federal Court. The trustee's election to litigate in a State Court should bind him in every way to that Court's determination and preclude re-litigation of the same cause of action in Federal Court. The serious questions of public policy involved herein and the effect of the decision below, if unreversed, upon the historic division of responsibility, at the option of the trustee in bankruptcy, between the State and Federal Courts in the administration of the Bankruptcy Laws, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

## CONCLUSION

**For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.**

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# APPENDIX.

## Memorandum Decision and Order Granting Defendant Summary Judgment and Dismissing Plaintiffs Complaint (Jan. 14, 1966).

(SAME TITLE)

BRENNAN, Judge.

This litigation, brought by two Trustees in Bankruptcy, arises from the complicated and alleged interwoven financial affairs of the three bankrupts named in the above caption.

The defendant, hereinafter referred to as "First Federal", has moved before this court seeking several types of relief, all of which have become academic except the motion to dismiss the complaint because same fails to state a claim against the defendant upon which relief can be granted. Upon the return day of the motion, voluminous supporting affidavits, documents etc. were filed in behalf of the moving party in support of the motion. It developed therefrom that a similar action had been brought by the same plaintiffs against the defendant in the State Supreme Court of Onondaga County. At the time of the return day of the motion, it appeared that there was pending, undetermined in the state court, defendant's motion for a summary judgment dismissing the complaint therein. Under the circumstances and upon the understanding that the actions were similar, this court stayed proceedings in this action awaiting the outcome of the pending motion in the state court. This court is now furnished with a copy of the decision of Supreme Court Justice Ringrose which granted the defendant's motion for a summary judgment dismissing the complaint and denied some six applications for relief, only one of which is pertinent here and which will be referred to below. Copy of an order in accordance with the decision is also submitted

to this court which is dated July 9, 1964 and filed in the Clerk's office of Onondaga County on July 14, 1964. The plaintiffs filed a notice of appeal to the Appellate Division Fourth Department and on motion of the defendant, same was dismissed by order dated November 30, 1965, copy of which has also been furnished this court.

An understanding of this decision requires a brief statement as to the background of and nature of the litigation instituted in both courts. The two corporations and the individual named in the caption, were adjudicated bankrupts on February 11, 1963 and May 28, 1963. The plaintiffs were duly appointed trustees of their estates by the Bankruptcy Court. Thereafter and about November 1963 an action was brought by the present plaintiffs against the defendant in the Supreme Court of Onondaga County. In that action, the plaintiffs sought to recover a money judgment in the amount of $248,000. with interest, based upon the contention that a business transaction which ultimately resulted in a mortgage loan by the defendant to the Randolph House Motor Hotel Corporation was in fact in violation of New York statutes. The asserted right to recover was based upon the contention that the payment to the defendant of $124,000. as an "origination" fee was in violation thereof. The background of the contention appears to be in substance that the Potter Securities Corporation and the Randolph Corporation were "dummy" corporations actually used to facilitate the borrowing of monies by the individuals involved and to conceal the alleged illegal mortgage loan. The preliminary negotiations and the documents involved therein which led to the mortgage loan, referred to above and dated June 26, 1962, are somewhat complicated and the details of same would seem to be unnecessary to this

decision. It is sufficient to say that the defendant contended that the documents involved showed without contradiction that its dealings were entirely with either of the two bankrupt corporations and that the ultimate transaction was in effect the recast or consolidation of corporate indebtedness owed by said corporations to a Syracuse bank. In any event, plaintiffs appear in no way to dispute but that the state court decision is a bar to the present action in this court insofar as the right to recover upon the contention that the "origination" fee was tainted by the state usury statute.

The controversy here arises only by plaintiffs' assertion submitted to this court in letter form that the present complaint should not be dismissed in its entirety for the reason that same presents a claim for relief in addition to that embraced on the so-called origination fee. This item is in the total amount of $55,144. It consists of three items alleged to represent payments by Donald S. Potter upon the mortgage held by the defendant, said payments being made in the months of August and September 1962.

If, as the state court has held, the usury statutes do not apply, it is difficult to understand how the payments alleged to have been made upon the valid mortgage instrument held by the defendant would be invalidated. The alleged fact that the payments were made by Donald Potter might have some relevancy to plaintiff's principal contention that the corporations were mere dummies through which he acted but would seem to have no probative effect upon the validity of the instrument itself. The above is not the full measure of plaintiff's difficulty in regard to this contention.

A motion was made before Justice Ringrose in the state court in which the plaintiffs requested permission to file a

supplemental complaint in which the plaintiffs sought to set up as a separate cause of action the identical three items of payments made as above. In fact the allegations in the supplemental complaint relative to such payments are substantially identical with those found in the present complaint. Justice Ringrose, on page 11 of his decision, specifically denied the requested permission and such denial was repeated in his order of July 9, 1964.

A comparison of the complaint and proposed supplemental complaint in the state court action with the present complaint in this court shows that the allegations of same are substantially similar and in most allegations the language used is identical. The right to recover, asserted by the plaintiffs in the state court action, rests upon the same factual and legal bases.

The problem is then further reduced to determining whether or not the principle of res judicata is applicable to the present motion which, since matters outside of the pleading, have been presented and not excluded by the court, may be considered as a motion for summary judgment. Rule 12 F. R. C. P.

No question is raised but that the state court had jurisdiction in the matter of the cause of action above referred to, as instituted and decided therein. Reported legal precedents appear to be unanimous in holding that an adjudication of a controverted matter by a competent state court forecloses further litigation as to issues actually raised and as to relevant issues which could have been litigated therein. This court does not understand that the above principle is seriously disputed. Same is discussed in the well known case of Angel v. Bullington, 330 U. S. 183. The following quotation, taken from Heiser v. Woodruff, 327 U. S. 726 at 733, 734, seems to be particularly appropriate. "It is well

settled that where the trustee in bankruptcy unsuccessfully litigates an issue outside the bankruptcy court". This latter decision is cited in our own circuit in the case of Masterson v. Atherton, 328 F. 2d 106 and the quotation, appearing at page 108, taken from Heiser v. Woodruff, supra, is likewise pertinent to the present motion, See also Walters v. Wilson, 142 F. 2d 59; Hobbs v. Franklin Jewelry Co. Inc., 131 F. 2d. 432; in re Epstein, 48 F. S. 436.

The above authorities applied to the facts and circumstances in this case are sufficient to conclude that the principle of res judicata applies and that defendant's motion, treated as one for a summary judgment, dismissing the complaint, must be and is granted, and it is

SO ORDERED.

STEPHEN W. BRENNAN
Senior U. S. District Judge.

RINGROSE, J.:

The plaintiffs herein moved for summary judgment or partial summary judgment which motion was withdrawn pending examinations before trial.

The defendant and third-party plaintiff cross moves pursuant to Rule 3212 C.P.L.R. for summary judgment dismissing the complaint.

On April 27, 1962, the defendant entered into a mortgage commitment agreement with Potter Securities Corporation to loan the latter $3,100,000.00 secured by a mortgage on the property of Randolph House Motor Hotel Corp., the capital stock of which was entirely owned by Potter Securities Corporation.

The mortgage commitment agreement provided that Potter Securities Corporation was to pay a mortgage origination fee in the total amount of $124,000.00 payable in two installments of $62,000.00 each.

The plaintiffs seek in this action to recover from the defendant the sum of $248,000.00 with interest on $62,-

000.00 from April 27, 1962, and with interest on $62,000.00 from June 21, 1962.

It is the contention of the plaintiffs that the above transaction was in violation of the usury statutes. (General Business Law, Article 25 and Article 10 of the Debtor and Creditor Law.) In support of this contention and to evade the impact of applicable statutes and case law to the contrary in respect to corporate transactions, the plaintiffs allege in substance that the Potter Securities Corporation was organized for the purpose of concealing the financial transactions of Donald S. Potter, individually, and that the corporate entity, in equity and good conscience, should be disregarded.

Potter Securities Corporation was originally incorporated under the name of Potter Hotel Corporation according to the Certificate of Incorporation filed with the Secretary of State on September 19th, 1946. (Exh. "G" appended to defendant's moving papers.) Thereafter, and on November 24, 1947 by certificate duly executed by Jackson M. Potter, and filed in the office of the Secretary of State of New York on December 19, 1947, the name was changed to Potter Securities Corporation. On the occasion of filing the certificate of the change of name, Shirley Feldman certified that she was secretary of Potter Hotel Corporation and that Jackson M. Potter, in person or by proxy, was the holder of all of the outstanding shares of the corporation entitled to vote on the change of name. (Last two pages Ex. "G" of defendant's moving affidavit.)

The Certificate of Incorporation of Randolph House Motor Hotel Corporation was filed with the Secretary of State on December 27, 1960, and in the Onondaga County Clerk's Office on January 12, 1961, approximately fourteen years after the Potter Hotel Corporation was incorpor-

ated. The total number of shares of capital stock authorized was two hundred, all of which were to be issued without par value. ( Exhibit "H", defendant's motion papers.)

Payment to the defendant of the mortgage indebtedness was guaranteed by an agreement in writing executed on June 22, 1962, by Donald S. Potter and Jackson Potter.

On February 11, 1963, Randolph House Motor Hotel Corp., was adjudicated a bankrupt and Eugene H. Klein, a plaintiff herein, was appointed trustee in bankruptcy.

Thereafter and on May 28, 1963, Donald S. Potter was adjudicated a bankrupt and on May 28, 1963, both Potter Securities Corporation and Jackson M. Potter were adjudicated bankrupt.

On June 25, 1963, Philip J. McNellis was appointed Trustee in Bankruptcy of Donald S. Potter and Potter Securities Corporation.

It is alleged in the complaint that according to the schedules in bankruptcy filed by Donald S. Potter, the claims of unsecured creditors totaled $1,301,362.62 and that the time to file claims has not expired.

The plaintiff contends (Par. 19 of the complaint) that "At all times hereinafter mentioned, Potter Securities Corporation was a 'dummy' corporation having no assets; doing no business; keeping no books; and merely from time to time, held record title of certain properties for and on behalf of and as a convenience to Donald G. Potter, the true and accountable owner of such properties, for the purpose of concealing usurious transactions, particularly in respect to the transaction with the defendant and Potter Securities Corporation".

It is alleged in the complaint of the plaintiff that all of the stock issued by Randolph House Motor Corp., (hereafter, Randolph) was at all times owned by Donald S. Potter and that no capital was paid to Randolph by Donald S. Potter for the issuance of said stock.

It is alleged in the following paragraphs of the verified complaint of the plaintiffs that:

> "20. On the 27th day of January 1959, Donald S. Potter purchased premises briefly known as part of farm lots 99 and 105 in the Town of Salina." (Site of Randolph Motor Hotel.)
>
> "21. Without consideration on March 20, 1959, Donald S. Potter executed and delivered to Potter Securities Corporation a Deed to said premises dated, acknowledged and recorded on March 20, 1959."
>
> "22. Without consideration, on June 4, 1959, Potter Securities Corporation executed and delivered a Deed to Donald S. Potter to said premises dated, acknowledged and recorded on June 4, 1959."
>
> "23. Without consideration, on February 24, 1961, Donald S. Potter executed and delivered a Deed to said premises dated, acknowledged and recorded February 24, 1961, to Potter Securities Corporation."
>
> "24. Without consideration Potter Securities Corporation executed and delivered a Deed to premises to Donald S. Potter dated, acknowledged and recorded February 28, 1961."
>
> "25. Without consideration Donald S. Potter executed and delivered a Deed to Potter Securities Corporation to said premises dated, acknowledged and recorded on the 17th day of April, 1961."

"26. Without consideration. Potter Securities Corporation executed and delivered a Deed to said premises to Randolph House Motor Hotel Corp. dated, acknowledged and recorded June 21, 1962."

During the period within which the above mentioned frequent transfers occurred, the Randolph House Motor Hotel was completed and furnished.

If the allegations of the complaint and averments in the affidavits of the plaintiffs are correctly interpreted, the plaintiffs seek to establish, by the above mentioned transfers, that the subject mortgage loan to Randolph was in truth and in fact knowingly made by the defendant for the benefit of Donald S. Potter, an undisclosed principal and thus avoid the immunity of the usury statutes to transactions between corporations.

The applicable statute and case law was recently exhaustively examined and correlated by Mr. Justice Simons in a motion for summary judgment in an action by Philip J. McNellis as Trustee of Donald S. Potter and Jackson M. Potter, Bankrupts v Columbia University. That action, as is this, was based upon the usury statute and also involved the financing of the construction of "Randolph" and consequently the issue of usury will not be considered at length herein. (Philip J. McNellis, as Trustee of Donald S. Potter and Jackson M. Potter, Bankrupts v Columbia University, —— Misc. ——, not yet reported.)

The defendant, First Federal Savings and Loan Association, challenged the sufficiency of the complaint on the ground that in paragraph 29 of the complaint which is incorporated in paragraph 30 of the complaint for a second cause of action and paragraphs 1, 2, 3, 4, 12 and 14 of the

notice of motion by the plaintiffs to strike and for summary judgment base their demand for relief upon the payment of the mortgage origination charge by Donald S. Potter. This, in itself, would require a dismissal of the plaintiffs' motion for summary judgment, since usury is only available to a borrower as a defense. (Salvin v Myles Realty Co., 227 N.Y. 51, p. 57; Edelman v Cymberg, 261 A.D. 698, 699; Kahn v Sohmer, 12 A.D. 2d 982; Del Rubio v Duchesne, 284 App. Div. 89, 94.)

This rule is succinctly stated in Jenkins v Moyse (254 N.Y. 319). Said the Court: "* * To sustain the judgment there must be evidence * * * that the defendants agreed to loan money to plaintiff, and did in fact make the loan to him. * * * there must be proof, at least, that there was an individual transaction which the parties might desire to conceal".

Here the loan was made to Randolph and not to an individual. Furthermore, it appears from the Loan Settlement Statement (Exh. 6 of plaintiffs' bill of particulars) and paragraph 11 (b) of plaintiffs' bill of particulars that the payment of the mortgage origination fee was made by Randolph. There is no allegation in the pleadings that Potter Securities Corporation made any payment. Moreover, the modification and extension agreement dated June 22, 1962, was between defendant and Randolph (Exh A of defendant's moving affidavit and Exh. 6 p. 2 of plaintiffs' bill of particulars) and which is admitted in paragraph 11 (b) of plaintiffs' bill of particulars. The accuracy of the foregoing contention of the defendant is corroborated by the affidavits of Eugene Bersani, William E. Scheu and Herbert A. Rogers, including the correspondence with the latter. (Exhs. B, C, D & E of defendant's affidavit and Exh. 6 of plaintiffs' bill of particulars.) The documentary proof

establishes beyond per adventure that no payments were made at any time by Donald S. Potter to the defendant. The proceeds of the mortgage loan in the amount of $3,100,000.00 was used primarily in refinancing outstanding secured loans as indicated on Exh. 6 of plaintiffs' bill of particulars and resulted in the reduction of the interest rate to six per cent (6%) and a 20-year extension of the mortgage indebtedness.

Lastly, it is established by documentary proof submitted on the motion that Randolph was solvent on June 21, 1962, when title of Randolph property was transferred to it according to plaintiffs' bill of particulars, paragraph 6 (a) The plaintiffs further therein admit that a contract for a sale of the property to First Republic Building Corp. was in existence, reciting a sale price of $5,250,000.00, and plaintiffs admit that the mortgages encumbering the property did not exceed $5,057,142.50.

Omitting further specification of documentary exhibits, it is conclusively established that the negotiations related to a loan from the defendant to Randolph to be secured by a first mortgage. There were no negotiations relating to a loan to an individual or individuals.

Even assuming that the funds necessary to pay the origination fee of $124,000.00 were borrowed by individuals and loaned to the corporation liable for the origination fee, the payment would not be usurious.

The authoritative law on this issue was fully correlated and ennunciated in Jenkins v Moyse (254 N.Y. 319).

Lastly, the plaintiffs urge, in substance, that the corporations were formed for the sole purpose of shielding the usurious transactions of the individuals and that in the in-

terest of justice and good conscience, the corporate entity should be disregarded to prevent fraud. (Jenkins v Moyse, 254 N.Y. 319, 324; International Aircraft Trading Co. v Manufacturers Trust Co., 297 N.Y. 285, 292.)

There are instances where corporations in the exclusive ownership and control of individuals have been used for their personal advantage, that the Courts have rejected the corporate entity to prevent fraud and imposed liability on the individual owning the outstanding shares of stock of the corporation. (Bartle v Finkelstein, 19 A.D. 2d 256.)

The authorities in which that contention has been successfully urged are rare and have been sustained only in those cases where the transactions have been between two or more corporations, the stock of which have been exclusively owned by the same individuals and the dual ownership has been used to defeat the claims of innocent third parties. (Berkey v Third Ave. Ry. Co., 244 N.Y. 84.)

The above authority is not applicable to the instant action. The logical application of the equitable doctrine of piercing the corporate veil was admirably stated by the Court in Halsted v Globe Indemnity Co., (258 N.Y. 176) wherein it was said:

> "In passing on this question no doubt can arise that the corporation must be viewed as an entity, separate and distinct from its stockholders. No rule of common sense or common justice is thereby violated. No wrong or fraud is shielded by the corporate charter. The corporation exists for the legitimate convenience of the stockholders, not a mere mask for the personal acts and responsibilities. It absorbs and takes the place of the individuals who own its stock. (Werner v Herst, 177 N.Y. 63; Brock v Poor, 216 N.Y. 387; Berkey v Third Ave. Ry. Co., 244 N.Y. 84.)"

The documentary proof submitted on this motion conclusively demonstrates that the refinancing of the outstanding mortgage indebtedness of Randolph by defendant was exclusively a transaction between business corporations and not subject to the usury statutes.

As was pointed out by Justice Simons in McNellis as Trustee, etc. vs Columbia University, which in the interest of convenience is quoted: "The New York General Business Law Section 374 provides that corporations shall not interpose the defense of usury in any action. This Section applies not only to corporations defending claims but also prevents a corporation from suing affirmatively to set aside conveyances and contracts on the grounds of usury. (Curtis v Leavitt, 15 N. Y. 9, p 152; Southern L & T Company v Packer, 17 N.Y. 51; Rosa v Butterfield, 33 N.Y. 665.) A corporation's representative stands in no better position than does the corporation itself, and is, likewise, prohibited from asserting the claim of usury in an affirmative action. (Butterworth v O'Brien, 23 N.Y. 275; Curtis v Leavitt, supra, page 132) and this is so even if the corporation was formed for the sole purpose of avoiding the usury statute. (Jenkins v Moyse, 254 N.Y. 319; Union Dime Savings Bank of New York v Wilmot, 94 N.Y. 221.)"

"Where the corporation is the principal obligor the fact of incorporation is a defense to usury and the Courts may not disregard the corporate entity. (Werger v Haines Corporation, 94 N.Y.S. 2d 691, affd. 277 A.D. 1108, 101 N.Y.S. 2d 361, affd. 302 N.Y. 930; Kings Mercantile Company, Inc. v. Cooper, 199 Misc. 381, 100 N.Y.S. 2d 754.)

It follows that the motion of the defendant for summary judgment dismissing the complaint with costs should be granted.

In view of the decision above announced, the following motions concurrently or subsequently argued or submitted by the plaintiffs in this action are denied without costs:

FIRST: Pursuant to Section 3042 C.P.L.R. to strike in part the demand of the defendant for a bill of particulars.

SECOND: Pursuant to Section 3211 C.P.L.R. to strike affirmative defenses.

THIRD: Pursuant to Section 3212 (g) C.P.L.R. to limit questions of fact.

FOURTH: To strike answering affidavits of Mitchell T. Williams in opposition to plaintiffs' motion to strike affirmative defenses.

FIFTH: To strike the affidavit of Mitchell T. Williams and Cortland L. Brovitz in support of defendant's motion pursuant to Section 3212 C.P.L.R. for summary judgment or partial summary judgment.

SIXTH: Permitting plaintiffs to file and serve a supplemental complaint.

ORDERED ACCORDINGLY.

/s/ E. H. RINGROSE
*Justice Supreme Court*

Dated: Rome, New York,
June 19, 1964.

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N.Y., commencing on the 30th day of November, 1965.

Present—Hon. Alger A. Williams, *Presiding Justice*. Hon. Harry D. Goldman, Hon. Frederic T. Henry, Hon. Frank Del Vecchio, Hon. John S. Marsh, *Associate Justices*.

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PHILLIP J. McNELLIS AS TRUSTEE OF DONALD S. POTTER, BANKRUPT, AND POTTER SECURITIES CORPORATION, BANKRUPT, EUGENE H. KLEIN AS TRUSTEE OF RANDOLPH HOUSE MOTOR HOTEL CORP., BANKRUPT, Appellants,

*vs*

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER, Respondent,

*vs.*

MYRON S. MELVIN, et al., Third Party Defendants, etc.

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A motion having been made on the part of the respondent to dismiss the appeal to this Court taken in the above entitled action, from an order of the Supreme Court, entered in the office of the Clerk of the County of Onondaga on the 14th day of July, 1964, for the failure of the appellants to file and serve the papers on the appeal,

Now, upon reading and filing the affidavit of Mitchell T. Williams, sworn to the 10th day of November, 1965, the no-

tice of said motion, together with proof of due service upon the attorneys for said appellants, the affidavit of Laurence Sovik, sworn to the 23rd day of November, 1965, in opposition thereto, and the reply affidavit of Mitchell T. Williams, sworn to the 29th day of November, 1965, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is granted, and the appeal so taken is hereby dismissed without costs. See Caira v. McKenna, 23 A D 2d 325.

Enter.

LESTER A. FANNING

Entered: 2nd day of December, 1965.

LESTER A. FANNING
*Clerk.*

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## ORDER OF JUSTICE RINGROSE GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN THE STATE COURT ACTION

PRESENT: HON. E. HOWARD RINGROSE, *Justice.*

The plaintiffs in the above entitled action, having made a motion to strike affirmative defenses of defendant, First Federal Savings and Loan Association of Rochester, pursuant to Rule 3211 of the Civil Practice Law and Rules, to limit questions of fact pursuant to Rule 3212(g) of the Civil Practice Law and Rules, and a motion for summary judgment or, in the alternative, partial summary judgment, pursuant to Rule 3212 of the Civil Practice Law and Rules; the plaintiffs in the above entitled action having also, by order to show cause, having made a motion for an order pursuant to Rule 3025 of the Civil Practice Law and

Rules for permission to file and serve a supplemental complaint; and the plaintiffs in the above entitled action having made a motion to strike the answering affidavit of Mitchell T. Williams, sworn to February 18, 1964, in opposition to plaintiffs' motions to strike affirmative defenses, for summary judgment or partial summary judgment, and to limit questions of fact, and to strike affidavits of Mitchell T. Williams and Cortland L. Brovitz, sworn to February 18, 1964 in support of defendant's motion for summary judgment or, in the alternative, partial summary judgment, and plaintiffs having withdrawn the aforementioned motion by plaintiffs for summary judgment or, in the alternative, partial summary judgment, pursuant to Rule 3212 of the Civil Practice Law and Rules, and plaintiffs having requested that the papers submitted by plaintiffs in support of their motions for summary judgment or, in the alternative, partial summary judgment, be considered by the Court in opposition to the hereinafter mentioned motion by defendant for summary judgment.

Defendant, First Federal Savings and Loan Association of Rochester in the above entitled action having made a motion for an order pursuant to Rule 3212 of the Civil Practice Law and Rules directing that judgment be entered herein in favor of the defendant on the grounds more particularly set forth in defendant's moving papers, the cause of action set forth in the complaint having no merit, and the defendant in the above entitled action having duly moved for an order directing plaintiffs to furnish defendant with a further bill of particulars or to preclude,

NOW, on reading and filing the following:

1. The plaintiffs' complaint herein verified November 21, 1963 and the exhibit thereto, and the answer of defendant,

First Federal Savings and Loan Association of Rochester, verified December 30, 1963, and Schedules A through E, thereto, inclusive;

2. The four (4) third-party summonses and complaints by defendant, First Federal Savings and Loan Association of Rochester, against (a) Myron S. Melvin, Crandall, Melvin, Raymond O. Campbell, Lawson Barnes, Louis Young, Edmund H. Easter, Dominic A. Mazza, George W. Cregg, Charles H. Thompson, Raymond J. Barth, Russell L. Egleston, Edward Brown, Jr., James M. Graham, Eugene F. Bersani, Crandall Melvin, Jr., Joseph S. McMahon, Richard D. Kharas, LaVerne F. O'Dell and Merle D. Melvin, d/b/a Melvin and Melvin of Syracuse, New York; (b) The Bersani Construction Corporation of Syracuse, New York; (c) The Merchants National Bank and Trust Company of Syracuse of Syracuse, New York; and (d) McKay Construction, Inc. of Syracuse, New York, together with Schedules A through D, A through D, A through F, and A through C, inclusive, thereto, respectively;

3. The third-party summons and complaint by third-party defendant, The Merchants National Bank and Trust Company of Syracuse, against third-party defendant, Manufacturers Hanover Trust Company, New York, verified April 21, 1964 and Schedules A through C, thereto, inclusive;

4. The demand for a bill of particulars by defendant, First Federal Savings and Loan Association of Rochester, dated December 30, 1963;

5. The four (4) answers to the third-party complaints brought by defendant, First Federal Savings and Loan Association of Rochester by (a) Myron S. Melvin, Crandall Melvin, Raymond O. Campbell, Lawson Barnes, Louis

Young, Edmund H. Easter, Dominic A. Mazza, George W. Cregg, Charles N. Thompson, Raymond J. Barth, Crandall Melvin, Jr., Joseph S. McMahon, Richard D. Kharas, LaVerne F. O'Dell and Merle D. Melvin, d/b/a Melvin and Melvin, verified February 14, 1964; (b) The Bersani Construction Corporation, verified January 24, 1964; (c) The Merchants National Bank and Trust Company of Syracuse, New York, verified February 14, 1964; and (d) McKay Construction, Inc., verified January 24, 1964;

6. Plaintiffs' bill of particulars verified January 3, 1963 and with Exhibits 1 through 6 thereto, inclusive; plaintiffs' further bill of particulars verified February 22, 1964;

7. Plaintiffs' order to show cause dated February 26, 1964, and the affidavit of Laurence Sovik sworn to February 26, 1964, and unverified supplemental complaint annexed thereto;

8. Plaintiffs' notice of motion, to strike affirmative defenses pursuant to Rule 3211 of the Civil Practice Law and Rules; plaintiffs' notice of motion for summary judgment or, in the alternative, partial summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules; and plaintiffs' notice of motion to limit questions of fact pursuant to Rule 3212(g) of the Civil Practice Law and Rules dated January 3, 1964, the affidavit of Laurence Sovik sworn to January 3, 1964, and Exhibits 7 through 11, thereto, inclusive;

9. Plaintiffs' notice of motion to strike in part the demand of defendant, First Federal Savings and Loan Association of Rochester, for a bill of particulars pursuant to Section 3042 of the Civil Practice Law and Rules, dated January 2, 1964;

10. Plaintiffs' notice of motion to strike the answering affidavit of Mitchell T. Williams, sworn to February 18,

1964, in opposition to plaintiffs' motion to strike affirmative defenses, for summary judgment or partial summary judgment, and to limit questions of fact and plaintiffs' notice of motion to strike affidavits of Mitchell T. Williams and Cortland L. Brovitz, sworn to February 18, 1964, in support of defendant's motion for summary judgment or, in the alternative, partial summary judgment, dated February 20, 1964.

11. Notice of Motion by defendant, First Federal Savings and Loan Association of Rochester, for summary judgment or, in the alternative, partial summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules dated February 18, 1964, the affidavit of Mitchell T. Williams sworn to February 18, 1964, annexed thereto, and Exhibits A through P, thereto, inclusive;

12. Notice of motion by defendant, First Federal Savings and Loan Association of Rochester, to direct a further bill of particulars or to preclude dated February 18, 1964, and the affidavit of Mitchell T. Williams sworn to February 18, 1964, annexed thereto;

13. The answering affidavit of Mitchell T. Williams sworn to February 18, 1964 for defendant, First Federal Savings and Loan Association of Rochester, in reply to plaintiffs' motion to strike affirmative defenses, summary judgment or partial summary judgment, and to limit questions of fact, pursuant to Section 3112 of the Civil Practice Law and Rules;

14. The supplemental affidavit, for defendant First Federal Savings and Loan Association of Rochester, of Cortland L. Brovitz sworn to March 19, 1964;

15. The affidavit, for defendant First Federal Savings and Loan Association of Rochester, of Herbert A. Ross sworn to March 19, 1964;

16. The affidavit, for defendant First Federal Savings and Loan Association of Rochester, of Eugene F. Bersani sworn to March 16, 1964;

17. The affidavit, for defendant First Federal Savings and Loan Association of Rochester, of Mitchell T. Williams sworn to March 19, 1964, Exhibits Q through U-2, inclusive, annexed thereto;

18. Reply affidavit, for plaintiffs, of Robert N. Smith sworn to February 27, 1964;

19. Affidavit, for plaintiffs, in opposition to defendant's motion for summary judgment by Laurence Sovik sworn to May 12, 1964.

Plaintiffs' motion for summary judgment having been withdrawn, those papers hereinabove mentioned submitted by the plaintiffs herein having been considered by the Court as requested by plaintiffs, in opposition to the defendant's motion for summary judgment, and after hearing Robinson, Williams, Brown, Robinson, and Angeloff, attorneys for the defendant, First Federal Savings and Loan Association of Rochester, Mitchell T. Williams, Esq. of counsel, in support of the motion by defendant, First Federal Savings and Loan Association of Rochester, for summary judgment and Smith, Sovik, Terry, Kendrick, McAuliffe and Schwarzer for the plaintiffs, Laurence Sovik, Esq., in opposition thereto, and due deliberation having been had, it is upon motion of Robinson, Williams, Brown, Robinson and Angeloff, attorneys for the defendant, First Federal Savings and Loan Association of Rochester, Mitchell T. Williams, Esq. of counsel, for the aforesaid defendant,

ORDERED, that said motion for summary judgment by the defendant, First Federal Savings and Loan Association

of Rochester be and it hereby is in all respects granted, and it is

FURTHER ORDERED, that the complaint be and the same hereby is dismissed and summary judgment granted defendant, First Federal Savings and Loan Association of Rochester, with $25.00 cost of this motion, and it is

FURTHER ORDERED, that the aforesaid motions by the plaintiffs to strike in part the demand of the defendant for a bill of particulars pursuant to Section 3042 of the Civil Practice Law and Rules, to strike affirmative defenses pursuant to Section 3211 of the Civil Practice Law and Rules, to limit questions of fact pursuant to Section 3212(g), to strike answering affidavits of Mitchell T. Williams in opposition to plaintiffs' motion to strike affirmative defenses, to strike the affidavit of Mitchell T. Williams and Cortland L. Brovitz in support of defendant's motion pursuant to Section 3212 of the Civil Practice Law and Rules for summary judgment or partial summary judgment, and to permit plaintiffs to file and serve a supplemental complaint, be and they hereby are in all respects denied, without costs, and since the granting herein of summary judgment to defendant, First Federal Savings and Loan Association of Rochester, renders a further bill of particulars or preclusion unnecessary, the motion by defendant for an order directing plaintiffs to furnish defendant with a further bill of particulars or to preclude be and is also hereby denied without costs, and it is

FURTHER ORDERED, that judgment be entered herein by the Clerk of this Court in favor of the defendant, First Federal Savings and Loan Association of Rochester, and against the plaintiffs, Phillip J. McNellis, as Trustee of Donald S. Potter, Bankrupt, and Potter Securities Corpora-

tion, Bankrupt, and Eugene H. Klein, as Trustee of Randoph House Motor Hotel Corp., Bankrupt, for the costs and disbursements of this action to be taxed by the Clerk of the Court and $25.00, cost of this motion.

Signed this 9th day of July, 1964, at Rome, New York.

Enter:

/s/ E. H. RINGROSE
E. HOWARD RINGROSE
*Justice, Supreme Court*
Onondaga County

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*Clerk*

Filed and Entered
July 14, 1964

# OPINION OF FEINBERG, J. FOR THE UNITED STATES COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 357—September Term, 1965.

(Argued May 2, 1966 Decided July 27, 1966.)

Docket No. 30327

PHILLIP J. MCNELLIS as Trustee of DONALD S. POTTER, Bankrupt *et al.*,

*Plaintiffs-Appellants,*

—against—

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER, 320 E. Main Street, Rochester, New York,

*Defendant-Appellee.*

Before:

LUMBARD, *Chief Judge,*
MOORE and FEINBERG, *Circuit Judges.*

Appeal from an order of the United States District Court for the Northern District of New York, Brennan, *J.*, granting a motion for summary judgment dismissing the complaint on the ground of *res judicata*. Reversed.

LAURENCE SOVIK, Syracuse, New York (Smith, Sovik, Terry, Kendrick, McAuliffe & Schwarzer, on the brief), *for Plaintiffs-Appellants.*

CARL ANGELOFF, Rochester, New York (Robinson, Williams, Brown, Robinson and Angeloff; Frank Aloi, on the brief), *for Defendant-Appellee.*

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FEINBERG, *Circuit Judge*:

Appellants, two trustees in bankruptcy, appeal from an order of the District Court for the Northern District of New York, which granted appellee's motion for summary judgment and dismissed the complaint. In a memorandum opinion, Judge Brennan held that the principles of *res judicata* compelled this result. For reasons set forth below, we reverse.

In November 1963, appellants sued defendant-appellee First Federal Savings and Loan Association of Rochester ("First Federal") in the New York Supreme Court, Onondaga County, in a two-count complaint. The first count alleged that plaintiffs were the trustees in bankruptcy of Randolph House Motor Hotel Corp. ("Randolph"), Donald S. Potter, Jackson M. Potter, and Potter Securities Corporation ("Potter Corp."), all adjudicated bankrupt in June 1963; that at all relevant times Donald Potter was insolvent and owned all the stock of Randolph, which was also insolvent; that Potter Corp. was a "dummy" organized by the Potters to hold title to certain properties for Donald Potter in order to conceal usurious transactions; that title to certain premises passed without consideration back and forth from Donald Potter to Potter Corp. several times and finally from that corporation to Randolph; that Donald Potter paid for the construction of a motor hotel on the premises; that a substantial portion of the materials and services for the construction was furnished by unsecured creditors of Donald Potter and Randolph; that on or about

April 27, 1962, First Federal entered into a mortgage commitment agreement with Potter Corp. on behalf of Donald Potter, under which Donald Potter paid First Federal $62,000 on April 27, 1962 and again on June 21, 1962; and that each payment, although characterized as a "mortgage origination fee," was actually intended to be interest on mortgage indebtedness in excess of that authorized by the New York General Business Law and federal statutes relating to banks and banking. The second count of the complaint alleged that the two payments of $62,000 were fraudulent dispositions of the bankrupts' property; that the payments were made without fair consideration and in violation of the New York Debtor and Creditor Law; and that they were made when defendant knew or should have known the bankrupts were insolvent and unable to pay their liabilities as they would mature. The complaint sought judgment for $248,000, with interest.[1]

Both sides moved for summary judgment in the state court action; plaintiffs' motion was later withdrawn. While the motions were pending, plaintiffs moved for permission to file and serve a supplemental complaint as "a third separate and distinct cause of action." After incorporating the original complaint, the supplemental complaint alleged that Donald Potter paid a total of $55,144 to First Federal on the mortgage ($3,100 on August 2, 1962, $26,022 on September 6, 1962, and $26,022 on September 21, 1962); that these payments were in violation of New York Debt. & Cred. Law §§273-76, New York Banking Law §380-e, and section 67d (2) of the Bankruptcy Act; and that defendant knew at the time of the payments that the bankrupts were insolvent

1 Plaintiffs sought double damages apparently under New York Banking Law §380-e.

and unable to pay their liabilities. The additional relief prayed for was a judgment of $110,288[2] and attorneys' fees.

In May 1964, while these motions were pending in the state court, appellants commenced the action in the court below. The federal complaint alleged virtually everything in the state complaints and a few more details of the transactions in question were provided. The complaint alleged that the two $62,000 payments represented illegal interest in violation of New York Banking Law §380-e and Article 10 of the New York Debtor and Creditor Law, and that the second $62,000 payment and the three subsequent payments totalling $55,144 were in violation of section 67d of the Bankruptcy Act and Article 10 of the New York Debtor and Creditor Law. The complaint sought double damages ($248,000) on the claims arising out of the two $62,000 payments and single damages ($55,144) on the later three payments.

First Federal moved below for summary judgment or a stay of proceedings on the ground that a state court action for the same relief was pending; Judge Brennan granted a stay pending determination of the state action. In June 1964, First Federal's motion for summary judgment in the New York Supreme Court was granted by Justice Ringrose. The judge viewed the state court action as one to recover $248,000 for violation of the usury statutes, requiring a piercing of the corporate veil to overcome the exception for corporate borrowers. He held that there had to be proof that there was a loan in fact to an individual (Donald Potter), which the parties might wish to conceal, but that the loan had actually been made to Randolph, which also paid the "mortgage origination fee" of $124,000. He stated that the documentary proof established that no payments

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2 See note 1, *supra*.

had been made by Donald Potter to defendant First Federal. For a number of reasons which need not concern us here, the state court refused to pierce the corporate veil to hold usurious the two payments of $62,000. The opinion focussed on those two payments, which, as indicated above, were the subject of the two counts of the original state court complaint; the opinion did not mention the three later payments, totalling $55,144, which were the subject of the proposed supplemental state court complaint. At the end of the opinion, Justice Ringrose alluded to six pending motions in the case and denied them all without discussion. He stated, *inter alia,*

> In view of the decision above announced, the following motions concurrently or subsequently argued or submitted by the plaintiffs in this action are denied without costs:
>
> * * * * *
>
> SIXTH: Permitting plaintiffs to file and serve a supplemental complaint.

An appeal was taken from this decision but was later dismissed in December 1965.[3]

At this point, First Federal understandably renewed its motion in the court below for summary judgment. Apparently, plaintiffs did not dispute below that the state court decision barred their federal action insofar as it sought relief because of a usurious "origination fee." Plaintiffs did insist, however, that the claim for $55,144 based on

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3 First Federal's motion to dismiss the appeal for failure of appellants to file and serve the papers on appeal was granted by the Appellate Division of the Supreme Court, Fourth Department on December 2, 1965.

the three subsequent payments on the mortgage in August and September 1962 was not barred. Judge Brennan held that since the state court determined that usury rules were inapplicable, the August and September payments made on a valid mortgage could hardly be invalidated. Judge Brennan also relied on the state court denial of permission to file the supplemental complaint, and the identity between the proposed third cause of action contained therein and the relevant portion of the instant complaint. He concluded that "the principle of res judicata" required granting defendant's motion for summary judgment.

Appellants' only contention here is that the court misapplied the principles of *res judicata*.[4] What those principles are in general is not difficult to state; applying them to specific situations is sometimes another matter. Briefly, where a judgment has been rendered in an action between two parties for a sum of money and there is subsequently another action between the same parties, the first judgment has varying conclusive effect. If the second action is based upon the same cause of action as the first, the prior judgment is conclusive as to all matters which were litigated or might have been litigated in the first action. However, if the second action is based upon a different cause of action, the prior judgment is conclusive between the parties only as to matters actually litigated and determined by the first judgment; that judgment is not conclusive as to matters which might have been, but which were not, litigated and

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4 Appellee claims that this court must look to state law to determine the effect of the prior judgment; appellants do not address themselves to this point. *Cf.* Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 Cornell L. Q. 96 (1965). In any event, we do not feel that the state and federal law differ sufficiently in the area crucial in this case to require further exploration here of the choice of law problem.

determined in the prior action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-53 (1877); Restatement, Judgments, 158-59 (1942). The obvious beginning for an inquiry into *res judicata* is a determination of what was claimed and decided in the first action. The state court complaint alleged that payments of $62,000, in April and June 1962, represented usurious interest (count one) and were a fraud on creditors (count two). The state court held that a corporate-borrower could not avail itself of usury rules. The only reference to the fraudulent transfer aspects of the complaint was that Randolph was solvent on June 21, 1962 (the date of the second $62,000 payment and of transfer of title to Randolph from Potter Corp.).[5] The court also denied without discussion permission to file a supplemental complaint substantially identical to the portion involved here of the complaint below.

Putting the supplemental complaint to one side for the moment, we cannot see how the dismissal of counts one and two of the state court complaint, based on payments in April and June 1962, bars the action here to recover other types of payments in August and September. Although analysis is rendered somewhat difficult by the jumble of theories and allegations in the complaints and briefs, it is quite clear that the federal complaint is now reduced only to recovery of a fraudulent transfer. In fact, plaintiffs use to their advantage the state court determination that Donald Potter was not the "real borrower." They assert that if this is so, then payments by Potter of $55,144 on a mortgage incurred by someone else (Randolph) were without consideration; since the payments were made within one

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5 The court also noted that apparently at the same date a contract to sell the property for $5,250,000 was in existence and the encumbering mortgages did not exceed $5,057,142.50.

year prior to bankruptcy at a time when he was insolvent, they were fraudulent transfers. The claim that appellants now press has nothing to do with usury or the "origination fee" and the fact that the later three payments may have represented interest is irrelevant. Therefore, the action now presented in its truncated form in the federal court is clearly a different cause of action from the action presented in count one of the original state complaint. It is true that count two of that complaint did contain a theory of fraudulent transfer to justify recovery of the $62,000 payments. But this theory depended upon establishing insolvency on April 27 or on June 21, 1962—the dates of the two payments—and concerned only these two payments. A cause of action for a fraudulent transfer in June is not the same as a cause of action for a fraudulent transfer in August or September. Restatement, Judgments §61, comment *c* (1942). Appellee emphasizes that all payments grew out of the same mortgage and that the mortgage, as pointed out by the court below, has been held valid. However, appellants are not now relitigating the legality of the mortgage; they assume it is valid, but question the propriety of payments on it by an alleged stranger to the transaction, Donald Potter. We conclude that the cause of action now pressed is not the same as that originally presented to the state court.

We do not view any of the cases cited by appellee on determining what is the same "cause of action" as compelling a contrary result. *Cf.* Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 824-25 (1952). *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d 464 (3d Cir. 1950), cert. denied, 341 U. S. 921 (1951), involved two civil antitrust suits, one based upon the Sherman Act, the other on the Clayton Act. The court concluded that the same

operative facts were present in each and that different theories of recovery did not necessarily mean different causes of action, a proposition we do not dispute. Of course, the issue then is what are the "operative facts"; here, unlike *Williamson*, significantly different evidence is required, see Restatement, Judgments §61 (1942), different time periods are involved and different amounts are sought. *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D. Del. 1954), is similarly distinguishable. *Smith* v. *Kirkpatrick*, 305 N. Y. 66 (1953), and *Schuylkill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304 (1929), if anything, support the conclusion we reach here. In the latter case, the court said at 250 N. Y. 308: "The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second." As indicated above, the state action here determined that the two $62,000 payments could not be recovered by the trustees; success in the action now before us could not "destroy or impair" that determination. Appellee's other cases similarly do not require us to hold that *res judicata* bars the trustees.

The present action might still be barred, however, if it could be fairly said that the issues still present had been litigated and decided in the state court action, but such is not the case. Appellants did claim in the state court that Donald Potter made the two $62,000 payments, and the state court held he did not. But that court did not have before it in the original state complaint the question whether Potter individually made the August and September payments. While Justice Ringrose stated that "no payments were made at any time by Donald S. Potter to the defendant," it is obvious that he was focussing only on payments up to June 21, 1962.

Therefore, since the cause of action still pressed by the trustees in this court is a different one from the cause of action originally presented to the state court in counts one and two of the state court complaint and since the key issues now presented were not there litigated and decided, normally principles of *res judicata* would not bar the action. However, there must still be considered the effect of the ambiguous disposition in the state court of the proposed supplemental complaint; *i.e.*, was there a judgment on the merits of that complaint sufficient to justify application of *res judicata* rules. If that proposed third cause of action had been included in the original state court complaint and defendant's motion for summary judgment had also been addressed to it, it may be conceded that plaintiffs would now be barred; identity both of parties and cause of action would present a classic case for applying the salutary policies behind the *res judicata* doctrine. However, the count was not included in the original complaint; according to the trustees, the reason it was not was that they did not find out about the August and September payments until after the state complaint had been filed.[6] Therefore, count three was never filed and technically was not before the state court; moreover, granting that this formality should not control, it is also quite clear that count three was never before the court in a realistic sense either. Plaintiffs' motion to file a supplemental pleading was brought under N. Y. Civ. Prac. R. 3025(b), which provides that "leave shall be freely given." Despite this statement of a liberal policy, the cursory reason given for denial of leave was "in

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6 Phillip J. McNellis was appointed bankruptcy trustee of the estates of Donald S. Potter and Potter Corp. on June 25, 1963. The state court suit was brought on November 21, 1963; the motion to file a supplemental complaint was brought on February 26, 1964.

view of the decision above announced." That decision did not discuss the fraudulent conveyance theory of the first complaint and focussed almost entirely on the usury aspects of that complaint; moreover, it dealt only with the issues arising out of the two payments of $62,000. We also note that N. Y. Civ. Prac. R. 5013 provides:

> A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise.

Since no motion for summary judgment with respect to the cause of action pleaded in the supplemental complaint was ever brought, there was no evidence at all adduced in plaintiffs' favor. And, as the proposed third cause of action was not even "dismissed," this would seem to be an *a fortiori* case for concluding that disposal of the supplemental complaint was not, on the merits. Finally, although the principles of *res judicata* should not be frugally applied, cf. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 38 (1950), a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue.[7] *Cf.* Cleary, *Res Judicata Reexamined*, 57 Yale L. J. 339 (1948). Under these circumstances, while it is conceivable that in denying leave to file the supplemental complaint, Justice Ringrose decided on the merits that the three payments in

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7 This would dispose of appellee's contention that *Angel* v. *Bullington*, 330 U. S. 183 (1947), controls here; the case is also inapposite because we do not have here, in any event, the closing of the door by the state to an entire class of suits.

August and September 1962 were not fraudulent transfers, the proposition is not persuasive.[8]

In summary, we conclude that there is no *res judicata* bar to the trustees' action on grounds other than usury based on the three payments which totalled $55,144.

Judgment reversed.

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8 The burden of showing the meaning of the former adjudication is on the party asserting the bar of *res judicata*. *Hyslop* v. *United States*, 261 F. 2d 786 (8th Cir. 1958); *Peckham* v. *Family Loan Co.*, 196 F. 2d 838 (5th Cir. 1952); *J. B. Sparrow Theatrical Amusement Co.* v. *Mack*, 195 Fed. 474 (2d Cir. 1912).

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IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1966

No. 607

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER,

*Petitioner,*

—*v.*—

PHILLIP J. McNELLIS, as Trustee of Donald S. Potter, Bankrupt, et al,

*Respondent.*

## Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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### Facts

Donald S. Potter (hereinafter called Potter) in 1962 was the owner of a newly constructed 300 room motor hotel known as the "Randolph House." For the purpose of making usurious loans, he transferred title to Potter Securities Corp. as his "dummy". (p. 7a)

On April 27, 1962 Defendant entered into an agreement with Potter Securities Corp. on behalf of Potter whereby Defendant was to receive $124,000 for a so-called "mortgage origination fee" for a mortgage loan of $3,100,000 to

be placed on the motel. The loan was closed June 26, 1962. Title to the motel on that day was transferred by Potter Securities Corp. to Randolph House Motor Hotel Corp., the stock of which was owned by Potter. (p. 9a)

On Sept. 21, 1962 title was transferred back to Potter and on the same day he transferred title to First Republic Bldg. Corp. to consummate a sale contract of the motel that he had made with First Republic Bldg. Corp. on May 22, 1962.

On May 28, 1963 Potter and Potter Securities Corp. filed voluntary petitions in bankruptcy and were duly adjudicated bankrupt. On June 25, 1963 McNellis was elected their Trustee. (p. 6a)

On Nov. 22, 1963 Plaintiffs commenced the State Court action alleging that said "mortgage origination fee" was in fact "usury" exacted from Potter in violation of Sec. 380 (e) of the New York Banking Law thereby entitling Potter to recover twice the amount of usury paid, to wit $248,000. Upon his adjudication in bankruptcy this right of recovery passed under Sec. 70 (a).(6) to Plaintiff McNellis as Trustee of Potter. (Record 39)

Defendant answered alleging that the "real borrower" was Potter Securities Corp. and hence the usury claims were not available to a corporation, under Sec. 274 of the N. Y. General Business Law and also that Potter in fact did not pay the $124,000; that $62,000 was paid by Myron S. Melvin and $62,000 deducted out of the proceeds of the loan on closing. (Record 39)

In the State Court action both sides moved for summary judgment. While these motions were pending Plaintiff moved for permission in the State Court action to serve a supplemental complaint alleging that Potter paid to Defendant by his checks, $3,100 on Aug. 2, 1962, $26,022 on Sept. 6, 1962 and $26,022 on Sept. 21, 1962 (all within one

year of the filing of the petition in bankruptcy) without consideration while insolvent in violation of Art. 10 of the Debtor and Creditor Law of New York and Sec. 67 (d) of the Bankruptcy Act. (Record 39)

While said motions in the State Court action were pending, Plaintiffs on May 12, 1964 commenced this action in The United States District Court for the Northern District of New York, combining therein the claim for the $248,000 and separately for recovery of said three payments of $3,100, $26,022 and $26,022. (p. 10a-11a)

On May 28, 1964 Defendant moved for summary judgment said U. S. District Court on the grounds that said State Court action was pending for the same relief or in the alternative that the Federal Court action be stayed until final determination of the State Court action. On June 12, 1964 stay was granted and determination of the motion for summary judgment withheld. (Record 16)

By order of the State Supreme Court on July 9, 1964 summary judgment in favor of Defendant was granted and Plaintiffs motion to serve a supplemental complaint to recover said three payments of $3,100, $26,022 and $26,022 was denied. (Before argument Plaintiff withdrew his motion for summary judgment.) (Record 39)

On Dec. 21, 1965 the motion in Federal Court for summary judgment was resubmitted. Plaintiff consented to dismissal of the action under Sec. 380 (e) of the New York Banking Law as having been decided by the State Court but urged that his cause of action to recover said three payments of $3,100, $26,022 and $26,022 as being made in voilation of Art. 10 of the New York Debtor and Creditor Law and Sec. 67 (d) of the Bankruptcy Act be sustained.

On Jan. 14, 1966 U. S. District Judge Brennan dismissed the entire complaint.

On appeal the Second Circuit Court of Appeals reversed. (Opinion Judge Feinberg, July 27, 1966)

**Questions presented in the Petition for Certiorari and Respondent's Answer thereto.**

Basically the four questions presented, set forth on page 2 of the Petition for Writ of Certiorari, depend entirely upon whether the Circuit Court correctly ruled that the denial by Justice Ringrose of Plaintiff's Motion to serve a Supplemental Complaint in the State Court Action was not "on the merits."

Respondent submits that the Decision of the Circuit Court was correct, but regardless nothing is contained in the Petition for Writ of Certiorari which falls within the requirements of Rule 37 (5) of this Court and particularly, "no substantial Federal questions are" presented which would justify granting the writ.

Admittedly, Petitioner cannot appeal as a matter of right and therefore the petition should be denied.

All of which is respectfully submitted,

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